
OLD WINE IN A NEW BOTTLE? A CRITICAL APPRAISAL OF THE BHARATIYA NYAYA SANHITA, 2023

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ABSTRACT

This paper undertakes a critical appraisal of the Bharatiya Nyaya Sanhita, 2023 (BNS), which has replaced the long-standing Indian Penal Code, 1860 (IPC). While presented as a landmark decolonizing and modernizing reform, this analysis contends that the BNS is fundamentally a project of consolidation and rebranding that preserves the substantive punitive core of its colonial predecessor. The Sanhita introduces some ostensibly progressive changes, such as the codification of contemporary offences like mob lynching and organised crime, and the inclusion of community service as a form of punishment. However, it simultaneously expands the coercive power of the state through vaguely defined offences, most notably the new provision for acts endangering the sovereignty of India, which replaces sedition, and a broad definition of terrorism. This expansion of state power is further entrenched by procedural alterations in the accompanying Bharatiya Nagarik Suraksha Sanhita, 2023 (BNSS), particularly concerning police custody, which threaten to erode established safeguards for personal liberty. The paper argues that the BNS misses crucial opportunities for genuine reform, such as criminalizing marital rape and making sexual offence laws gender-neutral, thereby perpetuating archaic legal norms. Consequently, the new legal framework raises significant constitutional concerns regarding the fundamental rights to equality, free speech, and life and personal liberty, as enshrined in Articles 14, 19, and 21 of the Constitution. The analysis concludes that the BNS represents more of a continuity of colonial state-centric logic than a substantive departure towards a citizen-centric, justice-oriented legal order, making the 'new bottle' a container for largely the same 'old wine', albeit with a more potent and concerning label.

Introduction

The Enduring Legacy of Macaulay's Code

The Indian Penal Code, 1860 (IPC), enacted by the Imperial Legislative Council and brought into force in 1862, stood for over 160 years as the bedrock of India's substantive criminal law.

¹ It was a monumental piece of legislation, born from the colonial project of governance and codification. Drafted by the First Law Commission of India, chaired by Thomas Babington Macaulay, the IPC was a product of its time—an instrument of colonial administration deeply influenced by the Benthamite "science of legislation" and utilitarian jurisprudence. ¹ Macaulay, an apparatchik of the Empire, envisioned the code as a tool for Anglicization and the establishment of a uniform legal system across the diverse territories of British India. ¹

Yet, to dismiss the IPC as a mere tool of colonial oppression is to overlook its profound jurisprudential significance. It was the first ambitious "codification enterprise" in the common law world, a comprehensive reformulation of criminal law that rejected many perceived defects of the existing English common law. ¹ Its core values of comprehensibility, precision, and certainty served as a model for numerous jurisdictions across the British Empire and beyond, influencing legal codes in Asia, Africa, and even the US Model Penal Code. ³ This enduring legacy presents a paradox for any reform effort claiming the mantle of "decolonization." A genuine decolonization of criminal law cannot be a simple act of replacing a statute of British origin; it must involve a fundamental re-evaluation of the relationship between the state and the citizen, particularly concerning the state's coercive and punitive powers, which were central to the colonial project.

The Decades-Long Clamour for Reform

The need for a comprehensive overhaul of India's criminal justice system is not a recent revelation. Since independence, numerous Law Commissions and expert committees have highlighted the IPC's colonial vestiges and its inability to keep pace with the evolving needs of a democratic republic. ⁴ The Law Commission of India, in a long series of reports, has recommended specific amendments to various provisions of the IPC and the Code of Criminal Procedure (CrPC). ⁷ Committees such as the Malimath Committee on Reforms of Criminal Justice System (2003) stressed the need for a holistic review, arguing against piecemeal amendments and advocating for a system that is more victim-centric and efficient. ⁹ The

Parliamentary Standing Committee on Home Affairs has also repeatedly urged the government to introduce comprehensive legislation to reform and rationalize the country's criminal laws.¹⁰ This long history of reform advocacy establishes a clear benchmark: any new legislation must be measured not only against the IPC it replaces but also against the decades of scholarly and committee-led recommendations that have preceded it.

Stated Objectives of the New Triumvirate

On August 11, 2023, the Union Government introduced three bills in the Lok Sabha to replace the foundational pillars of Indian criminal law.¹¹ These bills, after being referred to the Department-related Parliamentary Standing Committee on Home Affairs and subsequently reintroduced with amendments, were passed by Parliament in December 2023.¹² The Bharatiya Nyaya Sanhita, 2023 (BNS), the Bharatiya Nagarik Suraksha Sanhita, 2023 (BNSS), and the Bharatiya Sakshya Adhinyam, 2023 (BSA) replaced the IPC, the CrPC, 1973, and the Indian Evidence Act, 1872, respectively, coming into force on July 1, 2024.¹⁵

The government's stated rationale for this sweeping overhaul was ambitious and framed in the language of profound transformation. The objectives were to decolonize the legal system, shed the "colonial mindset," and create a citizen-centric legal structure that prioritizes *nyaya* (justice) over *dand* (punishment).¹⁷ The reforms were intended to simplify legal procedures, integrate technology, provide speedy justice, and make the laws relevant to contemporary societal challenges.¹⁸

Posing the Central Research Question

This paper seeks to critically examine these claims. It poses a central research question: Does the Bharatiya Nyaya Sanhita, coupled with its procedural and evidentiary counterparts, represent a substantive jurisprudential shift towards a more liberal, rights-based, and decolonized criminal justice system? Or is it primarily a cosmetic exercise of renaming, re-sequencing, and consolidating existing laws, which not only preserves but, in some aspects, strengthens the state-centric and punitive logic of its colonial predecessor? This paper will argue that while the BNS introduces some necessary updates and codifies certain judicially recognized principles, its overarching effect is one of continuity and, in crucial areas concerning civil liberties, regression. A true decolonization would have entailed a deliberate curtailment of the state's expansive police powers and a deeper alignment of the penal code

with constitutional morality.²³ By evaluating the BNS against this standard, this paper will demonstrate that it is, in essence, old wine in a new bottle—a rebranding that masks the reinforcement of a colonial-style authoritarian approach to criminal law.²⁵

A Comparative Overview: IPC, 1860 vis-à-vis BNS, 2023

To ground the subsequent doctrinal and constitutional analysis, it is essential to first map the key structural and substantive changes introduced by the BNS. The new Sanhita is not a complete departure from the IPC; rather, it is a comprehensive redraft that involves reorganization, addition, omission, and modification of existing provisions.

Structural Reorganization

The most immediately apparent change is the structural consolidation of the penal code. The BNS reduces the total number of sections from 511 in the IPC to 358.²⁶ This has been achieved by repealing obsolete provisions, merging related offences, and placing definitions and punishments within the same section in many cases.²⁸ A notable organizational shift is the prioritization of certain chapters. For instance, Chapter V of the BNS, 'Of Offences Against Woman and Child,' is now placed before Chapter VI, 'Of Offences Affecting the Human Body,' a symbolic move intended to signal a greater emphasis on the safety of vulnerable groups.²⁰ Similarly, inchoate offences like abetment, criminal conspiracy, and attempt have been consolidated into a single chapter for better coherence.²⁸

Key Additions

The BNS introduces several new, standalone offences, many of which were previously prosecuted under broader IPC provisions or governed by special laws. These include:

1. **Terrorist Act (Sec. 113):** For the first time, a definition of terrorism has been incorporated into the general penal law.¹¹
2. **Organised Crime (Sec. 111) and Petty Organised Crime (Sec. 112):** These provisions criminalize activities conducted by criminal syndicates, ranging from kidnapping and extortion to vehicle theft and selling public examination papers.¹¹
3. **Mob Lynching (Sec. 103(2)):** Murder or grievous hurt committed by a group of five or

more persons on grounds of race, caste, community, etc., is now a distinct offence.¹¹

4. **Snatching (Sec. 304):** Theft becomes snatching when it is done "in a sudden, quick or forcible manner."²⁸
5. **Sexual Intercourse by Deceitful Means (Sec. 69):** This new offence criminalizes sexual intercourse based on a false promise of marriage or by concealing one's identity.³⁴

Significant Omissions

The BNS formally removes several offences from the statute book, largely in alignment with landmark Supreme Court judgments that had rendered them unconstitutional or redundant.

Adultery (IPC Sec. 497): Omitted following the Supreme Court's decision in *Joseph Shine v. Union of India*, which struck it down as unconstitutional.³³

Unnatural Offences (IPC Sec. 377): The provision has been omitted. While the Supreme Court in *Navtej Singh Johar v. Union of India* had decriminalized consensual homosexual acts between adults, the complete omission of Section 377 also removes the penal provisions for non-consensual carnal intercourse with men and all forms of bestiality.¹¹

Attempt to Commit Suicide (IPC Sec. 309): This offence has been removed, though a new offence has been added to punish attempts to commit suicide with the intent to compel or restrain a public servant from discharging their duty (BNS Sec. 226).²⁸

Key Modifications

Several existing offences have been modified, either in their definition or punishment, with significant legal and political implications.

Sedition (IPC Sec. 124A) Replaced: The offence of sedition has been repealed and replaced by a new provision, Section 152 of the BNS, titled 'Acts endangering sovereignty, unity and integrity of India'.¹¹

Definitional Changes: The BNS updates several definitions to reflect contemporary social and legal understanding. The definition of 'gender' in Section 2(10) now explicitly

includes 'transgender'.³⁹ The term 'child' is defined as any person below the age of eighteen, aiming for uniformity, though inconsistencies remain.²⁰

Enhanced Punishments: The BNS increases the quantum of punishment, including imprisonment terms and fines, for numerous offences.²⁰ Mandatory minimum sentences have also been introduced for several crimes, including organised crime and terrorist acts.²⁸

Introduction of New Punishments

A significant jurisprudential change is the formal introduction of **Community Service** as a sixth form of punishment under Section 4(f) of the BNS.¹¹ This punishment is applicable to a limited number of petty offences, such as defamation, public intoxication causing annoyance, and minor theft where the stolen property is returned.⁴²

Table 1: Key Comparative Provisions of IPC, 1860 and BNS, 2023

Offence	Indian Penal Code, 1860 (Section)	Bharatiya Nyaya Sanhita, 2023 (Section)	Nature of Change / Key Remarks
Sedition	124A	152	Repealed and replaced with 'Acts endangering sovereignty, unity and integrity of India'. The new section uses vague terms like "subversive activities" and "separatist activities". ¹¹
Terrorist Act	Not defined (covered under UAPA)	113	New offence introduced in the general penal code. Definition is broad and includes acts intended to "disturb public order". ¹¹

Organised Crime	Not defined (covered under state laws like MCOCA)	111	New offence introduced, criminalizing acts by a crime syndicate. Includes economic and cyber-crimes. ¹¹
Mob Lynching	Prosecuted under Sec. 302 (Murder), 147 (Rioting), etc.	103(2)	New distinct offence for murder by a group of 5 or more on grounds of race, caste, etc. Punishment is life imprisonment or death, but minimum is 7 years for grievous hurt. ¹¹
Murder	302 (Punishment), 300 (Definition)	103(1) (Punishment), 101 (Definition)	Punishment retained (death or life imprisonment). Definition largely similar. ²⁷
Culpable Homicide	304 (Punishment), 299 (Definition)	105 (Punishment), 102 (Definition)	Punishment made stricter with specified minimum terms in certain cases. ³²
Death by Negligence	304A	106	Punishment increased. A new, more stringent provision (Sec. 106(2)) added for hit-and-run cases where the incident is not reported to authorities (currently held in abeyance). ¹⁶
Rape	375 (Definition), 376 (Punishment)	63 (Definition), 64 (Punishment)	Definition largely retained. Marital rape exception continues to exist,

			though the age of consent for a wife is raised to 18. ³⁵
Gang Rape	376D, 376DA, 376DB	70	Age threshold for victim to be considered a minor is uniformly raised to 18 years, attracting higher penalties (life imprisonment or death). ³⁰
Sexual Intercourse by Deceit	Prosecuted under Sec. 375 (misconception of fact) or 417 (Cheating)	69	New specific offence for sexual intercourse on false promise of marriage, employment, or by concealing identity. ³⁴
Theft	378 (Definition), 379 (Punishment)	303	Definition largely similar. For petty theft (value < Rs. 5,000) by a first-time offender, community service is prescribed if property is returned. ²⁸
Kidnapping	359-361	136-138	Definition of 'child' for kidnapping is now uniformly under 18 years, making it gender-neutral. ³²
Adultery	497	Omitted	Offence decriminalized in line with the Supreme Court's ruling in <i>Joseph Shine v. UoI</i> . ³³
Unnatural Offences	377	Omitted	Offence omitted. Decriminalizes

			consensual same-sex acts but also removes provisions against non-consensual male rape and bestiality. ¹¹
Attempt to Suicide	309	Omitted (partially)	Decriminalized, but a new offence (Sec. 226) punishes attempt to suicide to compel a public servant. ²⁸
Defamation	499, 500	356	Retained as a criminal offence. For first conviction, community service is an alternative punishment. ²⁸
Community Service	Not a punishment	4(f)	Introduced as a new form of punishment for 6 specified petty offences. ¹¹

Doctrinal & Constitutional Issues: A Thematic Scrutiny

The transition from the IPC to the BNS is not merely a legislative update; it is a re-articulation of the state's penal philosophy. A close examination of key provisions reveals significant doctrinal shifts and raises profound constitutional questions, particularly concerning the delicate balance between state security and individual liberty.

The Reincarnation of Sedition

The repeal of Section 124A of the IPC, the colonial-era sedition law, was presented as a cornerstone of the government's decolonization agenda.⁴⁵ However, its replacement, Section 152 of the BNS—'Act endangering sovereignty, unity and integrity of India'—appears to be a rebranding that not only retains the mischief of the original but potentially expands its scope.⁴⁶

Section 152 penalizes anyone who "purposely or knowingly, by words, either spoken or written, or by signs, or by visible representation, or by electronic communication or by use of financial mean, or otherwise, excites or attempts to excite, secession or armed rebellion or subversive activities, or encourages feelings of separatist activities or endangers sovereignty or unity and integrity of India." ¹¹ The provision is fraught with ambiguity. Terms like "subversive activities," "encourages feelings of separatist activities," and "endangers sovereignty" are not defined in the Sanhita, leaving them open to broad and arbitrary interpretation by law enforcement agencies. ²⁴

This vagueness poses a direct threat to the freedom of speech and expression guaranteed under Article 19(1)(a) of the Constitution. The doctrine of "chilling effect" posits that vaguely worded laws can deter individuals from exercising their legitimate rights for fear of prosecution. ³⁸ Crucially, Section 152 fails to explicitly incorporate the constitutional safeguard laid down by the Supreme Court in

Kedar Nath Singh v. State of Bihar.¹ In that case, the Court upheld the validity of Section 124A only by reading it down to apply exclusively to acts involving an incitement to violence or a tendency to create public disorder. ⁴⁸ By omitting this essential element, Section 152 reverts to a pre-

Kedar Nath understanding of sedition, where mere criticism or "disaffection" could be criminalized, thereby creating a provision that is arguably unconstitutional on its face.

Defining Terrorism and Organised Crime

The BNS, for the first time, incorporates the offences of 'Terrorist Act' (Section 113) and 'Organised Crime' (Section 111) into the general penal code. While this may be seen as a move to create a comprehensive penal statute, the definitions adopted are over-broad and create a problematic overlap with existing special legislations.

The definition of a "terrorist act" under Section 113 includes any act done with the intent to "disturb public order." ¹¹ This is a significant dilution of the concept of terrorism, which is typically associated with grave threats to national security and sovereignty. Equating the disturbance of "public order"—a term that can encompass relatively minor law and order

issues—with terrorism risks trivializing the heinous nature of terrorist acts and grants the state disproportionate powers to address routine disturbances.¹¹

Furthermore, these new provisions create a parallel legal framework alongside special laws like the Unlawful Activities (Prevention) Act, 1967 (UAPA) and various state-level Control of Organised Crime Acts (like MCOCA).¹¹ These special laws typically contain stringent procedural provisions, such as longer periods for detention without charge and stricter bail conditions, which deviate from the protections offered under the general criminal procedure. The BNS and BNSS do not specify which procedural law will apply when an act qualifies as an offence under both the BNS and a special law.¹¹ This ambiguity could lead to prosecutorial "forum shopping," where the state chooses to prosecute under the law with the most draconian provisions, undermining procedural fairness and legal certainty.

Codifying Mob Lynching

The introduction of Section 103(2) in the BNS, which specifically criminalizes murder or grievous hurt by a mob of five or more persons on grounds of race, caste, community, sex, or personal belief, is a direct legislative response to the Supreme Court's directive in *Tehseen S. Poonawalla v. Union of India*.² In that case, the Court condemned lynching as a "horrendous act of mobocracy" and urged Parliament to enact a special law.⁴² The codification of this offence is a symbolically important step in recognizing the gravity of identity-based hate crimes.

However, the provision contains a glaring doctrinal anomaly. While murder committed by an individual under Section 103(1) is punishable with death or imprisonment for life, murder committed by a mob under Section 103(2) is punishable with "death or with imprisonment for life, and shall also be liable to fine."⁵⁵ This appears consistent. The issue arises with the punishment for grievous hurt by a mob, which is punishable with imprisonment for a term of "not less than seven years, but which may extend to imprisonment for life."¹¹ The Standing Committee noted that the initial Bill prescribed a minimum of seven years for murder by a mob, which was lower than the minimum for individual murder (life imprisonment). While the final Act appears to have corrected this for murder, the legislative drafting has been criticized for creating confusion and potential sentencing disparities that defy legal logic. The rationale for creating a separate category of homicide with potentially different sentencing considerations remains unclear and could be challenged on grounds of arbitrariness.

Reforming Gender Violence Laws: Progress and Persistent Gaps

The BNS makes a concerted effort to address crimes against women and children by consolidating them into a dedicated chapter and introducing new provisions. There is undeniable progress in certain areas. Section 69, which criminalizes sexual intercourse by deceitful means, including false promises of marriage, provides a specific legal remedy for a prevalent form of exploitation.³⁰ The uniform age of 18 for victims of gang rape in Section 70 simplifies the law and ensures that all minors receive the highest level of protection, attracting severe penalties of life imprisonment or death.³²

Despite these advances, the BNS represents a significant missed opportunity for deeper, more meaningful reform. The most conspicuous failure is the retention of the marital rape exception.⁴⁶ By continuing to exempt a husband from prosecution for raping his wife (if she is over 18), the BNS perpetuates the archaic and patriarchal legal fiction that a woman relinquishes her bodily autonomy and sexual agency upon marriage. This is in direct conflict with the evolving constitutional jurisprudence on dignity, privacy, and equality under Articles 14 and 21, and ignores calls for its abolition from legal scholars and activists.²⁴

Additionally, the BNS retains anachronistic language such as "outraging the modesty of a woman" (Sections 74, 79), which frames sexual offences in terms of honour and modesty rather than as violations of bodily integrity and autonomy.²⁴ The Justice Verma Committee (2013) had recommended replacing this language with the term "sexual assault," but this has been ignored.¹¹ The failure to make the offence of rape gender-neutral, thereby denying legal recognition to male and transgender victims of penetrative sexual assault, is another critical gap that leaves the law misaligned with the lived realities of sexual violence.³⁷

Procedural Shifts under BNSS: A Blow to Personal Liberty

The substantive changes in the BNS cannot be viewed in isolation from the procedural modifications in the BNSS. One of the most alarming changes is in Section 187 of the BNSS, which alters the regime of police custody. Under the CrPC, police custody was limited to the first 15 days of remand.⁵⁹ The BNSS now permits the police to seek this 15-day custody in parts, at any time during the initial 40 or 60 days of the total 60 or 90-day period of judicial custody.⁵⁹

This seemingly technical change has profound implications for the fundamental right to

personal liberty under Article 21. It allows the state to hold the threat of police remand over an accused for a much longer period, effectively undermining their ability to secure bail.⁶¹ An accused person could be sent to judicial custody, secure bail, and then be re-arrested and sent back to police custody. This creates a cycle of detention that can be used to harass and coerce, transforming the investigative process itself into a form of punishment.⁶² This provision represents a significant expansion of police power and a dilution of judicial oversight, tipping the scales of the criminal process heavily in favour of the state.

The Digital Turn under BSA: Evidence without Safeguards

The Bharatiya Sakshya Adhiniyam, 2023, modernizes the law of evidence by recognizing electronic and digital records as primary evidence, having the same legal effect as paper documents.¹⁸ The definition of 'document' is expanded to include information stored in semiconductor memory, smartphones, and laptops.⁶⁵ This is a necessary adaptation to the realities of a digital age where most evidence is electronic.

However, this progressive step is not accompanied by corresponding safeguards to ensure the integrity and authenticity of such evidence. The Supreme Court has repeatedly acknowledged the vulnerability of electronic records to tampering and manipulation.⁶⁵ The BSA provides for the admissibility of digital evidence but lacks a robust procedural framework for its collection, preservation, and analysis. There are no statutory guidelines for maintaining a secure chain of custody for digital devices or for preventing the contamination of evidence during the investigation process.⁶⁶ Admitting potentially tampered electronic records as primary evidence without stringent verification protocols creates a grave risk of miscarriage of justice, where individuals could be convicted based on fabricated or manipulated digital data.

Critical Appraisal: Reform, Rebranding, or Regression?

Evaluating the BNS and its companion codes requires moving beyond a simple ledger of changes to assess their collective impact on the character of Indian criminal law. The central claim of decolonization, the trend towards over-criminalisation, and the cumulative effect on fundamental rights provide three critical lenses for this appraisal.

The Decolonisation Narrative: A Semantic Shift

The government's assertion that the new laws represent a "decolonization" of the criminal

justice system is largely rhetorical and unsubstantiated by the substantive content of the legislation.²⁴ The BNS, despite its Sanskritized title, retains the fundamental architecture, punitive philosophy, and state-centric orientation of Macaulay's IPC.⁴⁶ The core definitions of most offences, the general exceptions, and the principles of liability are carried over with minimal changes. The use of Hindi terminology is a semantic shift, not a jurisprudential one.²³

A genuine decolonization would have involved a fundamental rethinking of the relationship between the state and the citizen, prioritizing individual liberty over state control. This would have meant repealing or narrowly defining offences that curb free speech, removing archaic moral proscriptions, and strengthening procedural safeguards against arbitrary state action. The BNS does the opposite. By retaining a broader version of sedition, expanding police powers of custody, and failing to address patriarchal notions in gender laws like the marital rape exception, the new legal framework reinforces the very colonial logic of an all-powerful state that it claims to dismantle.²⁴

The Perils of Over-criminalisation

Far from simplifying the law, the BNS contributes to the growing problem of over-criminalisation in India. It achieves this in three distinct ways. First, it introduces new offences with broad and vaguely worded definitions, such as "subversive activities" and "disturbing public order" in the context of terrorism, which expands the net of criminality.²⁸

Second, it creates significant overlaps with a plethora of existing special laws.¹¹ Offences like terrorism, organised crime, food and drug adulteration, and unlawful compulsory labour are now punishable under both the BNS and specific central or state statutes.¹¹ This creates a confusing and duplicative legal landscape, leading to multiple regulatory regimes, inconsistent penalties, and the potential for an accused to be charged under several laws for the same act, thereby increasing the burden of compliance and defence.²⁸

Third, the BNS misses a crucial opportunity to decriminalize acts that are better addressed as civil wrongs. The retention of criminal defamation (Section 356), for instance, continues to provide a tool for powerful individuals and the state to intimidate journalists and critics, a practice inconsistent with the norms of a mature democracy.²⁸

Impact on Fundamental Rights: The 'Golden Triangle'

The cumulative impact of the new criminal laws poses a serious threat to the 'golden triangle' of fundamental rights—the interconnected and mutually reinforcing rights to equality (Article 14), freedom (Article 19), and life and personal liberty (Article 21).

Article 14 (Equality): The right to equality and equal protection of the laws is undermined by the BNS's failure to address deep-seated discrimination in the law. The retention of the marital rape exception creates an arbitrary classification between married and unmarried women, denying the former equal protection against sexual violence.⁶⁹ Similarly, the failure to make rape laws gender-neutral denies equal protection to male and transgender victims of sexual assault.⁷¹ These omissions perpetuate a legal framework where the full constitutional guarantee of equality is not extended to all citizens.

Article 19 (Freedom of Speech and Expression): This right is directly and severely impacted by Section 152 of the BNS. The provision's vague language and its failure to incorporate the *Kedar Nath Singh* test of incitement to violence create a potent instrument for stifling dissent, criticism of the government, and political protest, all of which are protected forms of expression under Article 19(1)(a).⁷²

Article 21 (Right to Life and Personal Liberty): This right is assaulted on multiple fronts. The expansion of police custody powers under Section 187 of the BNSS directly infringes on personal liberty by weakening the procedural safeguards against arbitrary and prolonged detention.⁵⁹ The Supreme Court has held that the "procedure established by law" under Article 21 must be "just, fair, and reasonable." A procedure that allows for fragmented and extended police custody, thereby creating an environment conducive to coercion and delaying access to bail, can hardly be described as such.

The Judicial Perspective: Interpreting the New Codes through Constitutional Precedents

The new criminal laws, with their significant departures and inherent ambiguities, are destined for extensive judicial scrutiny. The Supreme Court of India, as the ultimate guardian of the Constitution, will be tasked with interpreting these statutes and testing their validity against the touchstone of fundamental rights. This process will inevitably involve recourse to landmark constitutional precedents that have shaped the contours of Indian criminal jurisprudence. The

dissonance between the legislative text of the new codes and the judiciary's progressive interpretation of rights suggests an impending period of significant constitutional litigation.

The 'Just, Fair, and Reasonable' Procedure Test

The landmark judgment in *Maneka Gandhi v. Union of India*³ revolutionized the interpretation of Article 21. The Court held that the "procedure established by law" is not a mere formality but must be "right and just and fair" and not "arbitrary, fanciful or oppressive."⁷⁵ This principle of procedural due process will be the primary lens through which the procedural changes in the BNSS are examined.

The provision for fragmented police custody under Section 187 of the BNSS is particularly vulnerable to a *Maneka Gandhi* challenge.⁷⁸ The judiciary will have to determine whether a procedure that allows the police to seek remand in parts over an extended period of 40 or 60 days, thereby keeping the accused in a state of perpetual uncertainty and hindering their right to seek bail, is "just, fair, and reasonable." It is highly probable that the courts will read down this provision to require the police to provide compelling reasons for seeking subsequent periods of custody and to ensure that it is used only in exceptional circumstances, rather than as a routine investigative tool.

Curbing Arbitrary Arrests: The Continued Relevance of the *Arnesh Kumar* Guidelines

In *Arnesh Kumar v. State of Bihar*⁴, the Supreme Court, concerned with the widespread misuse of the power of arrest, particularly in cases under Section 498A of the IPC, laid down stringent guidelines.⁸⁰ The Court mandated that for any offence punishable with imprisonment up to seven years, arrest should not be automatic. The police officer must first satisfy themselves of the necessity of arrest based on the conditions laid out in Section 41 of the CrPC and record reasons for the same.⁸²

These judicially mandated safeguards are crucial for protecting personal liberty and will remain deeply relevant under the new legal regime. The BNSS, in Section 35, largely incorporates the principles of Section 41 CrPC. However, the expansion of police powers in other areas, such as custody, makes the strict enforcement of the *Arnesh Kumar* guidelines even more critical.⁸⁴ The judiciary will likely insist that these guidelines are scrupulously followed by both the police and magistrates to prevent the new laws from becoming instruments of harassment and

to uphold the principle that arrest is an exception, not the rule.⁸⁵

Sentencing under the BNS: The Expanded Scope of the Death Penalty and the *Manoj v. State of MP* Protocol

The BNS expands the number of offences for which the death penalty can be imposed, including new categories like murder by a mob and certain acts of terrorism.⁸⁶ This legislative trend towards expanding capital punishment appears to be in direct conflict with the direction of judicial thinking, which has been moving towards greater restraint and procedural rigour in death penalty sentencing.

In the recent and significant case of *Manoj v. State of Madhya Pradesh*⁸⁷, the Supreme Court laid down detailed guidelines to ensure a more humane and evidence-based approach to capital sentencing.⁸⁷ The Court mandated that trial courts must proactively collect information on mitigating circumstances of the accused, including psychiatric and psychological evaluations and reports on their socio-economic background and conduct in jail, before deciding on the sentence.⁸⁹ The aim is to ensure a "principled and individualised" sentencing process that gives full consideration to the possibility of reform and rehabilitation. The legislative expansion of the death penalty under the BNS, without a corresponding statutory framework for the collection of mitigating evidence as envisioned in

Manoj, creates a significant dissonance. The judiciary will be confronted with the task of ensuring that the *Manoj* protocol is applied to all capital cases under the BNS, thereby judicially tempering the legislature's punitive expansionism and reinforcing the "rarest of rare" doctrine.

A Brief Comparative International Perspective

Situating the Indian criminal law reforms within a global context provides valuable perspective on their trajectory. A brief comparison with other common law jurisdictions reveals that while some changes in the BNS align with global trends, others, particularly concerning civil liberties, move in a contrary direction.

- **Sedition:** The United Kingdom, the very country that introduced sedition into the IPC, abolished the common law offences of sedition and seditious libel through the Coroners and Justice Act, 2009.⁹⁰ The rationale was that such laws were archaic, unnecessary, and had a chilling effect on free speech, with other laws being sufficient to address incitement

to violence. India's decision to retain and rebrand sedition under Section 152 of the BNS stands in stark contrast to this trend towards abolition in mature democracies.⁹¹

- **Counter-Terrorism Laws:** The challenge of defining terrorism without infringing on civil liberties is a global one. The UK's Terrorism Act 2006, which criminalized the "encouragement" or "glorification" of terrorism, faced significant criticism for its potential impact on freedom of expression.⁹² Similarly, the broad definitions in the BNS, particularly the inclusion of "disturbing public order," reflect a global debate on balancing security and liberty. However, many jurisdictions have robust oversight mechanisms and a more developed jurisprudence on proportionality, which India's new framework currently lacks.
- **Sentencing Guidelines:** Many countries have moved towards structured sentencing to reduce judicial discretion and unwarranted disparity. The United States, for example, established the U.S. Sentencing Commission and the Federal Sentencing Guidelines in 1984 to promote uniformity and proportionality in sentencing.⁹³ While the mandatory nature of these guidelines has been diluted by judicial decisions, the framework for structured sentencing remains.⁹⁵ The BNS, while enhancing punishments for many offences, does not introduce any form of structured sentencing guidelines. This represents a missed opportunity to address the long-standing issue of sentencing disparity in the Indian criminal justice system.

Policy & Practical Implications

The enactment of the new criminal laws presents a set of formidable policy and practical challenges that will test the capacity and resilience of India's entire criminal justice apparatus. The transition from a legal framework that has been in place for over a century is not merely a matter of legislative change but requires a massive, coordinated effort in implementation, training, and infrastructure development.

The Implementation Challenge

The practical rollout of the BNS, BNSS, and BSA is a monumental task fraught with complexities.

Training and Capacity Building: The entire ecosystem of the criminal justice system—including millions of police personnel, thousands of prosecutors, and a vast judiciary—needs to be retrained.⁴⁶ This involves not just familiarization with new section numbers but a deep understanding of new definitions, procedures, and legal standards. State judicial academies and police training institutes face the enormous challenge of developing and delivering effective training modules on a massive scale.⁹⁸

Technological Infrastructure: The new laws are heavily reliant on technology. Provisions for electronic FIRs, service of summons via electronic means, audio-video recording of searches and seizures, and virtual court proceedings presuppose a robust and uniformly available digital infrastructure.¹⁸ However, the reality is a significant digital divide across India, with many police stations and courts, particularly in rural areas, lacking the necessary hardware, software, and reliable connectivity.⁹⁷ Without massive and sustained investment, the technological ambitions of the new laws may remain unrealized, creating a two-tiered justice system.

Transitional Justice: A significant practical challenge will be the management of the transitional period. Cases filed before July 1, 2024, will continue to be governed by the old laws, while new cases will fall under the BNS, BNSS, and BSA.¹⁰⁰ This will create a dual legal system for the foreseeable future, requiring judges, lawyers, and police to be adept in both frameworks. This is likely to lead to procedural confusion, litigation over applicability, and could paradoxically increase the case backlog in the short to medium term.⁴⁶

Implications for Law Enforcement

The new laws significantly alter the powers and responsibilities of the police. On one hand, they are granted enhanced powers, such as the expanded scope of police custody and the authority to detain persons to prevent cognizable offences.¹⁰³ On the other hand, they are burdened with new duties, such as the mandatory use of forensic investigation for all offences punishable with seven years or more of imprisonment.³⁴ This mandate, while laudable in its intent to improve the quality of investigations, places an immense strain on the country's already overstretched and under-resourced forensic science laboratories. Without a corresponding increase in funding, personnel, and infrastructure for forensic services, this

provision could become a major bottleneck in the investigation process, leading to further delays.

The Burden on the Judiciary

The judiciary will be at the forefront of navigating the complexities of the new legal regime. Judges will be tasked with interpreting numerous vaguely worded provisions, such as "subversive activities" and "feelings of separatist activities," thereby engaging in a process of judicial legislation to fill the gaps left by the drafters.⁹⁷ They will also have to adjudicate the inevitable constitutional challenges to provisions concerning sedition, terrorism, and police custody. This initial phase of interpretation and constitutional validation will place a heavy burden on the higher judiciary and could lead to a period of legal uncertainty. At the trial court level, managing the dual system of old and new laws, coupled with the new procedural timelines, will add to the existing pressures of a system already grappling with a staggering backlog of cases.¹⁰²

Conclusion and Suggestions

Revisiting the Metaphor

The central question posed by this paper is whether the Bharatiya Nyaya Sanhita is 'old wine in a new bottle'. The analysis reveals that this metaphor, while evocative, is incomplete. The BNS is not merely a rebottling of the old IPC; it is, more accurately, 'old wine, rebottled with a more potent label, and with several new, concerning ingredients added'. While it decants some soured elements from the colonial era, such as adultery and the criminalization of consensual homosexuality, it largely retains the vintage of state-centric punitive justice. The new ingredients—vaguely defined offences against the state, expanded police powers, and an increased scope for capital punishment—make the concoction more potent in its ability to curb civil liberties, fundamentally altering its character in a manner that is inconsistent with the principles of a modern, liberal democracy.

Summary of Findings

This paper has argued that the new criminal law framework, spearheaded by the BNS, falls short of its stated objectives of decolonization and creating a citizen-centric justice system. The key findings are:

1. **The Decolonization Narrative is Flawed:** The reforms are largely a cosmetic rebranding. The BNS preserves the core punitive and state-centric philosophy of the IPC, and the use of Sanskritized names does not alter this fundamental continuity.
2. **Expansion of State Power:** Through vaguely defined offences like the new sedition provision (Sec. 152) and terrorism (Sec. 113), and enhanced procedural powers like fragmented police custody (Sec. 187 BNSS), the new legal regime systemically expands the coercive power of the state.
3. **Persistence of Archaic Norms:** The BNS represents a missed opportunity for genuine social reform by failing to criminalize marital rape and retaining patriarchal language in laws concerning sexual offences.
4. **Erosion of Constitutional Safeguards:** The cumulative effect of these changes poses a significant threat to the fundamental rights to equality, freedom of speech, and personal liberty, creating a dissonance with decades of progressive constitutional jurisprudence developed by the Supreme Court.

Suggestions for the Path Forward

The successful transition to a new criminal justice system requires more than just legislative enactment. It demands a continuous process of refinement, interpretation, and institutional strengthening. To mitigate the concerns raised in this paper and to steer the new framework towards its professed goal of justice, the following suggestions are offered:

For the Legislature:

Amend Ambiguous Provisions: Parliament should urgently consider amending the BNS to narrowly define key terms in Section 152 ('subversive activities') and Section 113 ('disturb public order') to prevent their misuse. The *Kedar Nath Singh* test of incitement to violence must be explicitly incorporated into Section 152.

Address Gaps in Gender Justice: The marital rape exception must be abolished to ensure that all women are equally protected under the law. A comprehensive review of all gender-related offences should be undertaken to make them truly rights-based and gender-neutral.

Strengthen Evidentiary Safeguards: The Bharatiya Sakshya Adhiniyam should be amended to include a robust statutory framework for the collection, preservation, and authentication of electronic evidence, including mandatory guidelines for maintaining the chain of custody.

Rationalize Sentencing: The anomalous punishment for mob lynching should be rectified to ensure proportionality. The expansion of the death penalty should be reconsidered in light of judicial trends and international human rights norms.

For the Judiciary:

Uphold Constitutional Primacy: The constitutional courts have a critical role in interpreting the new laws through the prism of fundamental rights. The 'just, fair, and reasonable' test from *Maneka Gandhi*, the guidelines against arbitrary arrest from *Armesh Kumar*, and the sentencing protocol from *Manoj v. State of MP* must be rigorously applied to test the validity and application of the new provisions.

Provide Clarity: The higher judiciary should proactively issue practice directions and guidelines to lower courts to ensure a uniform and constitutionally compliant approach to the implementation of the new laws, particularly during the transitional phase.

For the Executive:

Invest in Implementation: The central and state governments must commit to a massive, well-funded, and sustained national mission for the training of police, prosecutors, and judicial officers.

Build Infrastructure: A time-bound plan for upgrading the technological and forensic infrastructure across the country is imperative for the laws' successful and equitable implementation.

Develop Guidelines for New Punishments: Clear and detailed guidelines for the administration of community service must be formulated to ensure it is implemented consistently and effectively as a rehabilitative measure, rather than an arbitrary punishment.

Ultimately, the success or failure of this historic legal overhaul will not be judged by the replacement of old statutes, but by its real-world impact on the lives of ordinary citizens and the health of India's constitutional democracy.

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